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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 237

WISCONSIN ELECTRIC POWER COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 134–140) is reported at 69 F. Supp. 743. The opinion of the Court of Appeals (R. 157–159) is reported at 168 F. 2d 285.

JURISDICTION

The judgment of the Court of Appeals was entered on May 26, 1948 (R. 159). The petition for a writ of certiorari was filed on August 21, 1948, and granted on October 18, 1948 (R. 161). The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED

The District Court found, and the Court of Appeals upheld the finding, that the predominant business of each of twenty-seven dairies to which the taxpayer furnished electrical energy was that of a fluid milk dealer and distributor, that the business was "commercial" in nature, and that pasteurization of milk by the dairies was only an incidental part of that business.

The question presented is whether the courts below correctly held that sales of electrical energy to these dairies for use in their plants, including the undetermined part of such energy used in pasteurization, were sales for "commercial consumption" within the meaning of Section 3411 (a) of the Internal Revenue Code.

STATUTES AND OTHER AUTHORITIES INVOLVED

The statutes and other authorities involved are set forth in the Appendix, *infra*, pp. 58–68.

STATEMENT

The pertinent facts, taken from the stipulation of the parties (R. 7–44) and the findings of the District Court (141–146), are as follows:

During the period April 1, 1940, to July 31, 1943, the taxpayer supplied electrical energy to twenty-eight customers engaged in the dairy business in and around Milwaukee, Wisconsin. (R. 13, 141.) Fifteen of the twenty-eight dairies were furnished the energy through more than one elec-

tric meter, provided by the taxpayer; but in no instances were the separate meters so connected as to enable the energy supplied for one purpose or another in the operations of the dairy to be differentiated. (R. 13, 141–142.)

During this period the taxpayer paid $6,806.84 in taxes on sales of energy to the twenty-eight customers, computed at the rate of three per cent to June 30, 1940, and three and one-third per cent thereafter. On May 25, 1944, the taxpayer filed with the proper Collector of Internal Revenue a claim for refund of these taxes on the ground that it had erroneously treated the sales of energy as sales for commercial consumption. The claim for refund was rejected by the Commissioner of Internal Revenue. (R. 142.)

The District Court found that twenty-seven of the dairies are predominantly fluid milk dealers and distributors.[1] (R. 146.) The twenty-seven operate in much the same way. They make contracts with farm producers for purchase of the milk daily and at other regular intervals, sometimes the producers delivering the milk to the dairies and sometimes the dairies supplying the trucks and drivers to pick it up. The dairies

[1] One of the dairies, Pabst Farms, was found to be engaged predominantly in the manufacture of condensed and powdered skim milk and butter fat which it sold at wholesale throughout the United States. The District Court held therefore that sales of electrical energy to it were not for commercial consumption. (R. 142–143.) No issue is here raised with respect to that dairy.

then weigh, test and mix the milk to obtain standard quality, pasteurize it, pour it in clean bottles and cans and keep the bottles and cans in cold storage rooms until the delivery men pick them up the same day or the following day. The delivery men cover definite territories or routes each day, delivering the milk to regular customers, including homes, restaurants, hotels and stores, daily and every other day in accordance with standing and specific orders. (R. 143–146.)

The dairies pasteurize the milk with specifically designed equipment. The milk is heated to 143° to 145° F., kept at that temperature for about thirty minutes and then cooled rapidly down to 38°–40° F. The purpose of pasteurization is to kill pathogenic bacteria in the milk while staying within such tolerances as neither to destroy the natural creaming properties of milk nor impart a scorched taste to it. (R. 144–145.)

Electrical energy is used by the dairies for lighting administrative offices and garages for the collecting and distributing trucks as well as the rest of the plants. It is also used to operate electric motors which pump refrigerants, deliver milk to and from pasteurizing vats and to bottling machines where pumps are necessary, operate bottling machines, operate bottle washers or sterilizers and conveyors, operate cream separators, operate homogenizers where the dairies have them, and perform similar functions. The larger dairies differ from the smaller ones chiefly

in the number of units available for different operations, such as a larger number of pasteurizing vats, more bottling machines, etc. (R. 145.)

The District Court found that the distribution of milk has existed in the United States as a distinct form of enterprise for nearly a century. Pasteurization of milk on a substantial scale was not established in this country until 1897. It came into use in Milwaukee in 1903, and by 1915 it was quite common practice. But even at the present time there are more raw milk plants in the United States than those which pasteurize their milk. In the cities of over one-thousand population in the United States, a majority of the milk dealers distribute unpasteurized milk; more than twenty-five per cent of all milk sold in such cities is not pasteurized. Two dairying experts testified at the trial that they had never heard of a dairy plant which pasteurized and bottled its milk which was not a distributor. (R. 143–144.)

It also found that while pasteurizing is an important part of the business of the dairies involved in the case, they likewise utilize systems of rapid regular distribution of fresh milk to their customers, and maintain fleets of trucks, horse-drawn wagons and drivers, garages, loading and unloading facilities, weighing and testing devices, storage and refrigeration rooms, and machinery for putting milk into bottles at high

speed. It found that the record showed pasteurization plays a minor part in the total business of the dairies. It utilizes only a small fraction of the total personnel, causes only a minor part of the capital investments and accounts for an insignificant part of the cost of operations. The investment of the dairies in pasteurizing equipment, including increased cooling equipment, is from fifteen per cent to twenty per cent of the total cost of their plant equipment, but this percentage figure would be considerably smaller if the investment in such items as trucks and other vehicles, horses, bottles, cases, etc., were taken into consideration. Assuming the sale price of a quart of milk in Milwaukee was sixteen cents, the cost of the milk itself was 9.6 cents, the distribution in bottles about four cents, and the entire plant operations about one cent. About one-tenth of a cent of the cost of plant operations is attributable to pasteurization. The predominant business of the dairies involved is, and was, that of fluid milk dealers and distributors. The electricity sold to them by the taxpayer was sold for commercial consumption; it was sold and used in a commercial business. (R. 146.)

The District Court concluded as a matter of law that the incidence of the tax on electrical energy did not depend upon the particular operation in which the energy was used but upon the business of which it formed a part. Since the

predominant business of the twenty-seven dairies is, and was, that of fluid milk dealers and distributors, the electricity sold to them by the petitioner was sold for commercial consumption; it was sold and used in a commercial business. (R. 147.)

The Court of Appeals held that the findings of the District Court correctly set forth the controlling facts and applied the proper test of commercial consumption. And it adopted the opinion of the District Court as its own. (R. 157–159.)

SUMMARY OF ARGUMENT

I

The tax at issue here is levied upon electrical energy sold for domestic or commercial consumption. "Commercial" has varied meanings, connoting in its narrowest sense buying and selling and in its broadest sense every phase of business activity. On its face the statute appears to use the term in a broad sense. And the electric industry classifications of consumers submitted to Congress at hearings when the tax was first considered in 1932 show that the industry used the term to cover substantially all business consumption.

II

The legislative history of the statute shows, however, that Congress intended to exempt from the tax on consumption by businesses, consumption

in industry. In this latter category it appears that Congress generally intended to include manufacturing and heavy industry, businesses in which electrical energy is commonly understood to be used in very substantial quantity as a source of power in manufacturing and in which differences in the cost of energy, even as small as the three percent tax, would be likely to have an important effect upon the cost of operation of the entire business and its ability to withstand the competition of businesses producing their own untaxed electrical energy.

III

Contemporaneously with the first enactment of the law in 1932, the Treasury construed the statute in accordance with the legislative intent. It gave the phrase "commercial consumption" a broad meaning in its Regulations covering all business consumption other than industrial, and by public utilities, and not merely buying and selling activities. And its rulings on specific cases likewise followed the same view. In one ruling in 1933 it expressly held that dairies obtaining milk and converting it into use for retail purposes are commercial in character and therefore their consumption of energy is commercial. Congress has never disapproved the Treasury's construction of the law. And the few reported cases show that the electric utilities have generally acquiesced in the Treasury's contemporaneous construction and applications.

An operation or activity which is a normal integral incident of a commercial business may not be characterized as industrial merely because, viewed in isolation, it does not constitute buying or selling. To interpret the statute so narrowly would be to nullify the tax on commercial consumption, since even in buying and selling businesses (although we submit Congress did not intend to confine commercial consumption merely to such businesses) electricity is used only as an incident of the business, for light, heat or power.

The portion of the Regulations dealing with two different uses of energy by the same consumer is intended to refer to consumers in two types of business and to industrial consumers having separated sales organizations, consuming energy through separate meters, problems which the statute does not resolve. It is not intended to narrow the meaning of the statute.

IV

The application of every reasonable test to determine the character of the fluid milk dealing business shows it to be commercial. They maintain and operate an effective daily distribution service between many producers and many consumers for a fresh clean food product readily subject to spoilage.

Pasteurizing the milk, which is a process of heating and cooling to destroy possible harmful

bacteria, is merely an incident of fluid milk dealing adopted in businesses already existing for many years and still not adopted by the majority of milk dealers. It is ordinarily not engaged in independently of such businesses. The cost of pasteurizing is relatively insignificant, it requires only a relatively small part of the milk handling and distributing personnel, and the investment in pasteurizing equipment is relatively small when compared to its distributing equipment. Though it may be called a "process", like many other processes it is still an incident of a commercial business and does not make the fluid milk dealers manufacturers or put them in industry. The courts below therefore properly held the sales of energy to the dairies were for commercial consumption.

ARGUMENT

I

INTRODUCTION

Section 3411 (a) of the Internal Revenue Code (Appendix, *infra*) imposes an excise tax "upon electrical energy sold for domestic or commercial consumption" to be paid by the vendor.

The statute provides no definition for "commercial".

"Commercial" is not a word of art; and dictionary definitions would support a very broad and comprehensive interpretation. See, e. g., Webster's New International Dictionary (Second

ed., 1948, unabridged). And this Court has noted that while "commerce" or "commercial" may possibly be used in a narrow sense to mean only "the purchase and sale or exchange of goods and commodities", it may also include, unless the context indicates otherwise, "other occupations and other recognized forms of business enterprise which do not necessarily involve trading in merchandise"; "in a broad sense it embraces every phase of commercial and business activity and intercourse". *Jordan* v. *Tashiro*, 278 U. S. 123, 127–128; *United States* v. *Underwriters Assn.*, 322 U. S. 533, 551. And cf. *St. Louis Refrigerating & Cold S. Co.* v. *United States*, 43 F. Supp. 476, 484 (C. Cls.).

If we took only the words of the statute, it would appear that Congress intended "domestic or commercial consumption" to cover the entire field of consumption of electrical energy, since it found it necessary to make express exception in Section 3411 (c) (Appendix, *infra*) for electrical energy sold to the United States, or to any state or territory, or political subdivision thereof, or the District of Columbia.

Moreover, if the meaning of the term "commercial" were sought from its usage in the industry upon which the law has its main impact, namely, the electric utility industry, at the time the law was first enacted, an extremely broad meaning of the term would have to be adopted. The statutory language was first enacted in Section 616 of the Revenue Act of 1932, c. 209, 47 Stat. 169

(Appendix, *infra*). Prior to the drafting of the law, hearings were held in which a representative of the association of all electric light and power companies was invited to testify. Hearings before the House Ways and Means Committee, 72nd Cong., 1st Sess., pp. 1159–1181. The classification of their customers submitted by the companies included in "commercial" all but domestic, municipal, public utilities and a small number of miscellaneous consumers (p. 1167). And the data taken by a Federal Trade Commission witness from an industry magazine used "commercial" in a similar sense (pp. 1154–1156). Cf. also Federal Power Commission, National Electric Rate Book (1940).

We do not argue, however, that the statute should be construed so as to make sales to all businesses taxable. The Government recognizes that the broad language used by Congress should be applied so as to give effect to the intention, evidenced by the legislative history, to exempt such sales of energy as are used by an "industrial" business for "industrial" purposes. *St. Louis Refrigerating & Cold S. Co.* v. *United States*, 43 F. Supp. 476, 484 (C. Cls.). If this exemption had been expressly made, it would of course have to be narrowly construed; this is *a fortiori* true here, where the exemption is not expressed and is based only on a due regard for the legislative purpose as manifested by the legislative history. We do not see how there can be found in the language

and context of the statute or in its legislative history support for the position of either the taxpayer (Br. 22, 27) or the *amicus curiae* (Br. 13, 20–21) that electrical energy sold for commercial consumption must be limited to that used in buying, selling and trading activities alone.

II

THE LEGISLATIVE HISTORY SHOWS THAT CONGRESS INTENDED TO TAX SALES OF ENERGY TO COMMERCIAL BUSINESSES AND TO EXEMPT SALES FOR USE IN INDUSTRY

The language of Section 3411 of the Internal Revenue Code had its origin in Section 616 of the Revenue Act of 1932. Although the House Ways and Means Committee held hearings in 1932 on the feasibility of an electrical energy tax, it did not provide for it in the revenue bill it reported. (H. Rep. No. 708, 72nd Cong., 1st Sess. (1939–1 Cum. Bull. (Part 2) 457).) On May 31, 1932, the Senate approved a new provision proposed from the floor, without prior consideration by the Senate Finance Committee, by Senator Howell of Nebraska as an amendment to the then pending revenue bill. 75 Cong. Record, Part 10, pp. 11559, 11615–11616. This amendment provided:

> There is hereby imposed upon energy sold by privately owned operating electrical power companies a tax equivalent to 3 per cent of the price for which so sold.

When the Revenue Bill emerged from conference of the two Houses, however, Section 616 had been changed by the conferees to provide (75 Cong. Record, Part 11, pp. 12001, 12017, 12046):

> There is hereby imposed a tax equivalent to 3 per cent of the amount paid on or after the fifteenth day after the date of the enactment of this act, for electrical energy for domestic or commercial consumption furnished after such date and before July 1, 1934, to be paid by the person paying for such electrical energy, and to be collected by the vendor.

Since the crucial limiting language was inserted by the conferees, weight must be attached to their explanations. The Joint Conference Committee Report stated (H. Conference Rep. No. 1492, 72nd Cong., 1st Sess., p. 22 (1939–1 Cum. Bull. (Part 2) 539, 548)):

> The House recedes with an amendment substituting a tax of 3 per cent of the price paid for electrical energy for domestic or commercial use (as distinguished from industrial use), to be paid by the purchaser and collected by the vendor * * *.

Representative Crisp of Georgia, a House conferee, explaining the Conference Report on the floor of the House, declared that the Senate provision had been deleted because it was unfair to investors in electric companies and that instead "the conferees finally agreed on a 3 per cent sales tax on commercial and domestic consumers

of electric energy." 75 Cong. Record, Part 11, p. 12012. And this explanation of Representative Crisp was also quoted on the Senate floor prior to its approval of the conference report. 75 Cong. Record, *supra*, p. 12066.

While the conferees, as such, made no additional express statements in their reports or on the floor of either House as to the meaning and purpose of the limitation in tax to sales of electrical energy for domestic or commercial consumption, the attention of both Houses immediately prior to approval of the conference report was called to the fact that, just before the Senate approved the original proposal of Senator Howell taxing the electric companies on sales to all consumers, two of the Senate conferees, Senators Smoot of Utah and Reed of Pennsylvania, members of the Finance Committee, had been defeated in two attempts to substitute taxes on consumers, in one case limited to sales of energy for domestic consumption and in the other to sales for domestic and commercial consumption, in language almost identical to that reported by the Conference Committee. 75 Cong. Record, Part 11, pp. 12027, 12054, 12055, 12056, 12057, 12061; Part 10, pp. 11603–11615.

At that time the reason advanced by Senators Smoot and Reed for their substitute amendments was that the tax would inevitably be passed on by the electric companies to the consumers in any event and that it would be unfair to pro-

ducers in industry who had to buy their electric power in competition with those who manufactured their own untaxed power. 75 Cong. Record, *supra*, Part 10, pp. 11604, 11605, 11606, 11607, 11608, 11609. The discussions on the Smoot and Reed proposals uniformly related to whether or not manufacturers and manufacturing businesses, producers in industry and industry should be exempted, and not as to whether any particular operations in which electricity was used should or should not be covered.[2] 75 Cong. Record, Part 10, pp. 11603-11615. For example, Senator Howell, the author of the original proposal, stated (p. 11604):

> I understand that one of the arguments advanced for relieving power consumers—I am speaking of power consumers who use electrical energy for power only—was that they would be placed at a disadvantage because of this tax as compared with the manufacturing establishments which produce their own energy. Mr. President, assume that a manufacturing concern were paying 5 mills for its electrical energy—one-half of a cent—under my amendment how much would that

[2] Under circumstances such as are here involved the Congressional discussions, and particular expositions by those most responsible for the legislation, have been held of considerable value in ascertaining the intent of Congress. *Wright* v. *Vinton Branch*, 300 U. S. 440, 463, 464; *United States* v. *San Francisco*, 310 U. S. 16, 22.

manufacturing establishment pay if the tax were passed on? * * *

Senator Reed stated (p. 11606):

> The Committee on Finance started out with a study—a very brief one, I am afraid—of the Howell amendment. It was pointed out to us that it would make a serious difference in the competitive situation between those large producers in industry which manufacture their own power and the smaller producers who purchase power; that it would put a handicap on those who have to buy their power.

In reply to a question by Senator Borah of Idaho, Senator Reed stated again (p. 11606):

> If we put the tax on industrial consumption, we impose a handicap upon the smaller producers everywhere, as against the larger producers who make their own power.

At another point, in a colloquy between Senator Reed and Senator Harrison of Mississippi, it was stated (p. 11609):

> Mr. HARRISON. Is "industrial" included in "commercial"? I notice in the hearings the words "industrial" and "commercial" were used.
>
> Mr. REED. No; industrial is not included.
>
> Mr. HARRISON. Should not that be included?
>
> Mr. REED. I do not think so, because in that case there would result the inequity

between the big concern that makes its own power and the little one that does not.

In 1933, Congress revised the tax on electrical energy into the form in which it has substantially remained at present. It transferred the tax from the consumer to the electric company but continued to limit it to "electrical energy sold for domestic or commercial consumption." Act of June 16, 1933, c. 96, 48 Stat. 254, Sec. 6, Appendix, *infra*. And here, too, it appears that what was in the minds of those sponsoring the legislation was the nature of the consumer's business and not the specific operation in that business to which the electrical energy was put.

As in 1932, the electrical energy tax provision was first introduced as a floor amendment to another tax bill, but this time in the House. 77 Cong. Record, Part 2, p. 2045. As passed by the House the bill did not change the scope of the tax but merely shifted the burden from the domestic or commercial consumer to the electric company which sold the energy to him. 77 Cong. Record, Part 2, pp. 2045, 2050. The Finance Committee of the Senate, however, rewrote the House bill to decrease the three per cent tax on the vendor on sales for domestic and commercial consumption to two per cent and added a one per cent tax upon consumers of electrical energy "for purposes other than domestic or commercial." S. Rep. No. 58, 73rd Cong., 1st Sess., p. 3 (1939-1 Cum. Bull. (Part 2)

884, 885.) And the Senate so approved it. H. Conference Rep. No. 188, 73rd Cong., 1st Sess. (1939-1 Cum. Bull. (Part 2) 886); 77 Cong. Record, Part 6, pp. 5460–5461. Then, after disagreement in conference as to the form the final bill should take, the Senate concurred in the House version and they both passed it in that form. 77 Cong. Record, Part 6, pp. 5392, 5460–5461, 5462, 5468. Act of June 16, 1933, *supra*.

While the formal report of the Senate Finance Committee did not specifically define "commercial consumption," the explanation of the report by its chairman, Senator Harrison, showed that what the Committee was concerned with was the nature of the businesses in which the electrical energy was used and not the kinds of motors or lights or any specific operation or device for which the energy was used. And he also indicated to the Senate that what was meant by "commercial" business was the reciprocal of "industry," since he referred to the Senate's proposed one per cent tax upon energy "for purposes other than domestic or commercial" as an industrial energy tax. 77 Cong. Record, *supra*, Part 3, pp. 3212–3214, 3215. He stated in part (pp. 3212–3213):

> I am telling Senators nothing new when I remind them that we had a fight here in 1932 over the imposition of this tax. The Senate imposed a 3 percent electric-energy tax, and it was finally

> adopted, to be collected from the consumer of electric energy. We applied that only on domestic and commercial energy; that is, electric energy used in stores and dwellings that are classified as commercial and domestic. There was no tax in the 1932 act imposed upon energy employed in industry.
>
> * * * The subcommittee reported to the full committee and we discussed it several days and finally have adopted and recommended to the Senate a provision for a tax of 2 percent on commercial and domestic energy, to be collected at the source from the power companies, reducing the House proposal in that respect from 3 percent to 2 percent. Then we have recommended an industrial electric-energy tax of 1 percent to be collected from the consumer.

Senator Couzens of Michigan, who together with Senators Barkley of Kentucky and Reed of Pennsylvania, constituted a subcommittee of the Senate Finance Committee to consider the electrical energy tax (77 Cong. Record, Part 3, p. 3220), explained (p. 3218):

> I stated that when the Senate originally adopted the electrical energy tax in 1932 it did not include energy used for manufacturing, for the reason, as I thought at the time, that such a tax would create an unfair competitive condition. However, I find I was in error; that as the Senate adopted

the amendment it included all electric energy, whether used for manufacturing or for commercial or domestic purposes. The conferees, and I think properly so, eliminated the tax on electrical energy consumed in manufacturing.

* * * * *

I mean they eliminated that feature of the tax; they eliminated the tax on electrical energy sold to manufacturing plants and left the tax on electricity used commercially, that is by stores and on electricity used for domestic purposes * * *.

Senator Barkley made similar explanations (77 Cong. Record, Part 3, pp. 3217, 3222):

I presume, regardless of whether the 3-percent tax is paid on electrical energy used for commercial and domestic purposes, or whether it is divided, 2 percent on electricity used for those purposes and 1 percent on electricity used by industry, what the Senator is trying to drive at is to limit the tax to energy produced by privately owned companies?

* * * * *

Mr. President, as far as the straight 3-percent gross tax upon the distribution of industrial power affecting industry is concerned, under the amendment offered by the Senator from Nebraska, if there was any virtue in the argument made a year ago that this tax ought not to be levied on industry because it would make it more

> difficult for industry to carry on during the depression, and employ the men it was able to employ, it would be even more true with a 3-percent gross tax upon electrical energy. The committee felt that a 1-percent tax upon the distribution of industrial electric power was sufficient * * *.

Senator Connally of Texas, still another member of the Finance Committee, in discussing an amendment of his own to tax those manufacturers who made their own energy, also made clear to the Senate that whether a sale of energy was for commercial consumption depended upon whether or not the energy could be considered as used by industry and not upon the particular operations, in the following colloquy (77 Cong. Record, Part 3, p. 3242):

> Mr. METCALF. Mr. President, there are a good many charitable institutions and educational institutions which make their own electricity. Does the Senator think it is fair to impose the tax on them?
>
> Mr. CONNALLY. Such a use of energy would not be industrial, would it?
>
> Mr. METCALF. Are they exempt?
>
> Mr. CONNALLY. Does the Senator refer to industrial power?
>
> Mr. METCALF. No; I mean light and power used in hospitals.
>
> Mr. CONNALLY. That is not industrial power. This applies only to industrial power. That to which the Senator refers is commercial and domestic.

Since no attempt was made in the House to revise the provisions of the earlier law to broaden the scope of the tax, little further illumination may be found in its debates. But the statement of the managers on the part of the House with respect to a conference report interpreted the phrase "domestic or commercial consumption" in the same manner as did Senator Harrison. Concerning the Senate's one per cent tax on sales of electrical energy "for purposes other than domestic or commercial," it stated that the Conference Report "omits the provision of the Senate amendment imposing a tax on the consumer of industrial energy." 77 Cong. Record, Part 5, p. 4762. And in the presenting of a later conference report, Representative Samuel B. Hill of Washington, a conferee, explained that the Senate bill had reduced the tax in the House bill from three to two per cent upon electrical energy "for domestic or commercial use" and levied a one per cent tax on "energy to be used in industry" to be paid by the consumer. 77 Cong. Record, Part 6, p. 5462.

That Congress was considering types of businesses rather than particular operations performed as incidents of a single business must also be apparent from the fact that the Senate bill proposed to tax commercial consumption to the vendor at two per cent and industrial consumption to the consumer at one per cent. The Senate could hardly have intended to require the electric companies to install a separate electric meter for

each operation of a consumer's business or to involve the Treasury in the stupendous job of analyzing every business in the country to ascertain what percentage of its consumption of electrical energy related to its productions and what percentage to its commercial operations.

The legislative history of the statute thus leads to the conclusion that in taxing sales of energy for commercial consumption Congress intended to obtain revenue from sales of energy to homes and businesses; but at the same time it intended to exempt from the tax sales of energy merely to those businesses or business activities which are ordinarily considered to be manufacturing or heavy industry, including public utilities and mining, of the kind in which electrical energy is commonly understood to be used in very substantial quantity as a source of power and in which differences in the cost of energy, even as small as the three per cent tax, would be likely to have an important competitive effect upon the cost of operation of the entire business.

III

THE LONG EXISTING TREASURY REGULATIONS AND THE RULINGS OF THE BUREAU OF INTERNAL REVENUE ISSUED SUBSTANTIALLY CONTEMPORANEOUSLY WITH THE ENACTMENT OF THE STATUTE SUPPORT THE CONSTRUCTION MADE BY THE COURTS BELOW

The Treasury's contemporaneous understanding of the electrical energy tax at the time of its

original enactment gave a broad meaning to the term "commercial." Eleven days after the enactment of the Revenue Act of 1932, c. 209, 47 Stat. 169, the Secretary of the Treasury approved Treasury Regulations[3] taking the position that "commercial" was not intended to refer to any narrow conception of selling and trading activity but to businesses generally, except for the special group which Congress had in its consideration of the law lumped together as "industry." The Treasury considered that the taxable businesses could more readily be defined by listing typical examples of the narrower and more homogeneous group which were excluded than by enumerating the more numerous and varied types which were included. Thus, Article 40 of Treasury Regulations 42, as originally promulgated, Appendix, *infra*, separated the untaxable from the taxable as follows:

> "Electrical energy for domestic or commercial consumption" includes all electrical energy furnished the consumer except electrical energy furnished for industrial consumption. Electrical energy for industrial consumption includes that used generally for industrial purposes, that is, in manufacturing, processing, mining, refining, irrigation, shipbuilding, building construction, etc., and by public utilities,

[3] The Revenue Act of 1932 was enacted June 6, 1932. The first edition of Treasury Regulations 42 containing a chapter on the electrical energy tax was approved June 17, 1932.

waterworks, telephone, telegraph, and radio companies, railroads, and other common carriers.

An amendment to the Regulations a month later (T. D. 4342, XI–2 Cum. Bull. 495 (1932), Appendix, *infra*) was apparently made with the thought that the public utilities should be excluded as a separate group rather than as industrial businesses. And charitable institutions were also excepted on the theory that they could not fall within the concept of commercial businesses. But except as these specific exceptions appeared the Treasury Regulations continued to provide that all electrical energy furnished the consumer was taxable.[4] Article 40 of Regulations 42 thereafter remained substantially unchanged until in 1941 by T. D. 5099, 1941–2 Cum. Bull. 267, 286, the provisions relating to the electrical energy

[4] As amended by T. D. 4342, Article 40 of Treasury Regulations 42 (Appendix, *infra*) read in part as follows:

> All electrical energy furnished the consumer is taxable except (1) electrical energy furnished for industrial consumption, e. g., that used in manufacturing, processing, mining, refining, shipbuilding, building construction, etc., and (2) that furnished for other uses which likewise can not be classed as domestic or commercial, such as used by public utilities, waterworks, irrigation companies, telegraph, telephone, and radio communication companies, railroads, other common carriers, educational institutions not operated for private profit, churches, and charitable institutions. However, electrical energy is subject to tax if consumed in the commercial phases of industrial or other businesses, such as in office buildings, sales and display rooms, retail stores, etc.

tax were transferred to Regulations 46 where in substance the same provisions may now be found at Section 316.190 (Appendix, *infra*).[5] During this entire period, although revisions and re-enactments of the revenue laws have been made, including several affecting the electrical energy tax,[6] in no instance has the Treasury's broad construction of commercial consumption been disapproved, and it must therefore be regarded as having been approved by Congress. *Helvering* v. *Winmill*, 305 U. S. 79, 83; *Fondren* v. *Commissioner*, 324 U. S. 18, 29–30.

As the statute was a new one and the Regulations were necessarily in general terms, the Bureau of Internal Revenue was also compelled to make numerous rulings on individual businesses shortly after the tax became effective. The contemporaneous rulings of the Bureau in 1932 and 1933 on specific cases which were published also support the broad construction of "commercial" which we believe to be correct and are contrary to the view urged by the taxpayer (Br. 22, 27) and the *amicus curiae* (Br. 13, 20–21) that "commercial" must be confined to

[5] At the same time "processing" was eliminated from the list of consuming business excluded from tax as industrial consumption. The Government does not believe this was a substantial change. This deletion is discussed *infra*.

[6] Act of June 16, 1933, c. 96, 48 Stat. 254, Sec. 6; Revenue Act of 1938, c. 289, 52 Stat. 447, Sec. 713; Internal Revenue Code, Sec. 3111; Revenue Act of 1941, c. 412, 55 Stat. 687, Sec. 521 (a); Revenue Act of 1943, c. 63, 58 Stat. 21, Sec. 307 (a).

selling and trading activities. Thus, the Bureau ruled in 1932 that there was included in commercial consumption: energy used in the outdoor advertising business (S. T. 464, XI–2 Cum. Bull. 496); energy consumed by motion picture theaters (S. T. 466, XI–2 Cum. Bull. 497); energy furnished grain elevators predominantly engaged in purchasing, storage and resale of grain for producers (S. T. 527, XI–2 Cum. Bull. 499); energy used in hospitals operated for profit (S. T. 562, XI–2 Cum. Bull. 501); energy consumed by radio broadcasting stations operated for commercial or entertainment purposes (S. T. 576, XI–2 Cum. Bull. 502); energy furnished to closed industrial plants (S. T. 590, XI–2 Cum. Bull. 503, modified in part by S. T. 641, XII–1 Cum. Bull. 410 (1933)); energy furnished cold storage warehouses for use in the production of refrigeration for storage purposes (S. T. 615, XI–2 Cum. Bull. 504). The Bureau ruled in 1933, among other things, that electrical energy furnished to a warehouse operated in connection with chain stores, for use in receiving, repacking and distributing goods, operating freight elevators, refrigeration, electric trucks, blowers, conveyors, motors on bakery machinery, air conditioners, pumps and lighting was commercial in scope because it was incidental to a business whose predominant character was commercial (S. T. 652, XII–1 Cum. Bull. 411); that energy furnished to a corporation engaged in the operation and maintenance of a cemetery for use in

lighting a garage was taxable because the cemetery was a commercial venture (S. T. 674, XII–1 Cum. Bull. 412); that energy furnished in the operations of farming, including that used for ensilage cutters, cream separators, oat crushers, threshing machines, water pumps and miscellaneous machinery was taxable as either domestic or commercial in scope (S. T. 637, XII–1 Cum. Bull. 409; S. T. 695, XII–2 Cum. Bull. 324).

In 1933 the Bureau ruled specifically with reference to dairies (S. T. 637, XII–1 Cum. Bull. 409, 410) (Appendix, *infra*):

> A dairy which obtains milk and converts it into use for retail purposes is held to be engaged in a business commercial in character. Electrical energy used in such operations will be subject to tax.
>
> Electrical energy furnished to dairies which are engaged in the manufacture and sale of butter, cheese, and similar dairy products is not subject to the tax imposed by section 616 of the Revenue Act of 1932.[1]

[1] In 1932 the Bureau issued a ruling that "Electrical energy furnished for consumption by bottling works, milk companies, or creameries engaged in the pasteurization and bottling of milk, and in the manufacture of butter, buttermilk, chocolate milk, and cottage cheese, is not furnished for domestic or commercial consumption". S. T. 518, XI–2 Cum. Bull. 498 (1932) (Appendix, *infra*). Apparently realizing, however, that this broad ruling, applicable to dairies and creameries engaged in a variety of activities, might not be adequate to meet the needs of Collectors who had to decide on the taxability of sales of energy to consumers solely

Both the contemporaneous Regulations and the rulings cited thus show that the Treasury Department understood "commercial consumption" in the same sense as may be inferred from the legislative history of the law. "Commercial consumption" is not merely that energy used in buying and selling; it includes as well the energy used in all the normal and customary incidents of businesses not predominantly in industry in the sense to which we have previously adverted.

This contemporaneous construction by the executive department charged with the administration of the law and the general acquiescence in such construction by the large utility corporations directly affected by its application[8] ought to be

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or predominantly fluid milk dealers or distributors and not cheese or butter manufacturers, shortly after the first ruling, the bureau modified it by issuing S. T. 637, above. See Bureau's contemporaneous explanation (Appendix, *infra*, pp. 67–68.)

Although S. T. 637 has been followed to date by the Bureau of Internal Revenue (R. 115), it is significant that for nine years, until action was filed against the United States in the District Court for Colorado by the Public Service Company of Colorado in 1942 (*Public Service Co. of Colorado* v. *United States* (Colo.), decided July 6, 1943 (32 A. F. T. R. 1720), affirmed, 143 F. 2d 79 (C. A. 10th)), none of the many electric utility companies of the United States affected by the ruling brought suit to contest it, and the taxpayer here did not file a claim for refund until May 1944. (R. 2, 8.)

[8] Until *Public Service Co. of Colorado* v. *United States*, *supra*, was decided in July 1943, only two other cases had been brought to contest the Bureau's construction or application of the electrical energy tax with respect to "commercial consumption." These were *St. Louis Refrigerating & Cold S. Co.* v. *United States*, 43 F. Supp. 476 (C. Cls.) and *Fulton*

given great weight in determining its meaning, even independently of the reenactment rule. *White* v. *Winchester Club*, 315 U. S. 32, 41; *Better Business Bureau* v. *United States*, 326 U. S. 279, 286; *Brewster* v. *Gage*, 280 U. S. 327, 336.

Both the taxpayer (Br. 37–40) and the *amicus curiae* (Br. 14, 15–16, 19) urge, however, that a portion of the Regulations lends support to the notion that though a business is predominantly commercial, an operation or activity, even if it is merely a normal integral incident of the commercial business, may be industrial (or "in industry") if the operation or activity, viewed in isolation from the rest of the business, is not carried on as a "commercial" activity. And this view was apparently likewise shared by the Court of Appeals for the Tenth Circuit when it stated in *United States* v. *Public Service Co. of Colorado*, 143 F. 2d 79, 82, that the electrical energy used in pasteurizing "was not used in the commercial phase of the dairying enterprise, but in

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Market Cold Storage Co. v. *United States*, 43 F. Supp. 485 (C. Cls.), both decided March 2, 1942.

During the hearings held on the 1933 amendment which made the electric companies pay the tax, a representative of 75 percent of the companies testified that they had given a broader construction to the term "commercial" than even the Treasury had, and that the Treasury had excluded many large commercial consumers and had classed them as industrial. (Hearings before the Senate Finance Committee on H. R. 5040, Amendment to Revenue Act of 1932, 73rd Cong., 1st Sess., May 2 and 3, 1933, pp. 3, 30.)

the processing or industrial phase of the enterprise."

The portions of the Regulations relied on by both the taxpayer and the *amicus* are the following (Treasury Regulations 46, Sec. 316.190, Appendix, *infra*):

> However, electrical energy is subject to tax if sold for consumption in the commercial phases of industrial or other businesses, such as in office buildings, sales and display rooms, retail stores, etc., * * *.
>
> Where electrical energy is sold to a consumer for two or more purposes, through separate meters, the specific use for which the energy is sold through each meter, i. e., whether for domestic or commercial consumption, or for other use, shall determine its taxable status. Where the consumer has all the electrical energy consumed at a given location furnished through one meter, the predominant character of the business carried on at such location shall determine the classification of consumption for the purposes of this tax.

These portions of the Regulations first appeared in Article 40 of Treasury Regulations 42, as amended in July 1932 by T. D. 4342.

We submit, however, that these additions to the Regulations were not intended to change the meaning of "commercial consumption" so as to permit classification of particular uses, opera-

tions and activities as "industrial" without regard to their relationship to the nature of the business as a whole. Electrical energy is ordinarily used for light, power or heat. As such it may light a room or building or it may operate a motor that lifts an elevator or compresses a refrigerant or turns a fan or pump. But if the use is commercial it is not because of what the energy does but because the operation or activity in which it is used is an incident to a commercial business. If the criterion of a sale of energy for commercial consumption were whether the specific use of the energy is commercial apart from the nature of the business in which it is an incident, the law would be reduced to an absurdity since no use of energy would fall within the taxable status.

The portion of the Regulations relied on by the taxpayer and *amicus curiae* has a far more reasonable purpose than is suggested by their arguments. When Congress considered the broad concepts of commerce and industry for purposes of the tax, it apparently did not take into account the fact that some enterprises engage in more than one kind of business, and the law made no express provision for this contingency. The Treasury was also faced with the classification for purposes of the tax of sales organizations and branches of large industrial corporations having separate buildings and stores, which could hardly

come within the reason for the statutory exemption of industrial consumption. Since the statute provided no express answer to these problems, the Treasury adopted what it considered was the most practical and reasonable construction of the law. It amended its Regulations to provide that where there were separate meters measuring the different types of consumption, the tax would attach only to the energy sold for commercial consumption. Where there was a single meter, the predominant nature of the business at the location would control. If the non-industrial portion of an industrial business constituted a separate phase of the business, and if it had a separate office building, sales and display rooms, retail stores, etc., so that the energy used in these separate suborganizations could be separately measured, the tax would attach there too. It is difficult to see how another construction of the statute could have been made which would have been more consistent with the legislative purpose or more reasonable and fair in its application. And we submit that the asserted inconsistency between the Regulations and the decision of the courts below is more fancied than real.

The language of this Court in *Bowles* v. *Seminole Rock Co.*, 325 U. S. 410, 413–414, is especially pertinent here:

> Since this involves an interpretation of an administrative regulation a court must

necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.

IV

THE DAIRIES TO WHICH THE TAXPAYER SOLD THE ELECTRICITY ARE MILK DEALERS OR DISTRIBUTORS AND THE ELECTRICAL ENERGY FURNISHED THEM WAS FOR COMMERCIAL CONSUMPTION

There is no controversy in this case with respect to sales of energy to creameries or dairies engaged predominantly in the business of making and selling butter, cheese, ice cream and similar products. In cases where it has been shown that such is the predominant business of a customer, the Government does not attempt to assess or collect a tax on sales of energy to it. (S. T. 637, Appendix, *infra;* R. 113–115.) But with the exception of sales to the Pabst Farms, upon which taxpayer apparently inadvertently paid the tax, the energy at issue here was sold to customers whose business the trial court found to be predominantly that of fluid milk dealers and distributors. (R. 31, 142–143, 147.)

The milk dealers[9] involved take orders from customers living in definite territories or routes in the City of Milwaukee and adjoining communities for the daily and sometimes even more frequent delivery of fresh milk.[10] Most of the orders are received from homes, but in some instances they are also obtained from restaurants, hotels and stores. The dealers in turn obtain the milk in bulk from country producers scattered at various places in Wisconsin, outside of Milwaukee, with whom they make contracts for the delivery of fresh milk at daily or other regular intervals to their establishments in Milwaukee and the adjoining communities.[11] In some instances the producers bring the milk to Milwaukee; in others the dealers use their own trucks and drivers. (R. 8, 9, 143.)

That the maintenance and operation of an effective daily distribution service between producer and consumer for a food product readily subject to spoilage is a commercial business, the District Court held to be clear. (R. 137.) The only question which remains is: Does the fact that

[9] Pabst Farms will be excluded from this category in the discussion, *infra*, as it may not properly be described as a milk dealer.

[10] At the time of trial, however, wartime restrictions caused the introduction of alternate day deliveries. (R. 143.)

[11] The bulk of the milk is brought in from over an area extending thirty to thirty-five miles outside of Milwaukee though some as far as fifty miles. (R. 87.)

the dealers pasteurize the milk make their businesses predominantly industrial?

The District Court held that the fact that the twenty-seven dairies employ pasteurization to purify their milk does not cause the predominant character of their businesses to be other than that of fluid milk dealers and distributors; that the electricity sold to them by the taxpayer was sold and used in commercial businesses; and that it was sold for commercial consumption. We submit that in so holding the District Court applied the most reasonable tests which could be used consistently with the statute and Regulations, and that its conclusions are the only ones which it could properly have reached from the evidence.

Pasteurization, as practiced in modern dairies, consists of an efficient method of heating milk short of boiling to destroy a maximum quantity of bacteria, if they happen to be present, without inducing the changes in flavor ordinarily caused by boiling. (R. 9, 66, 77–78, 144–145.) The milk is then cooled sufficiently soon thereafter to avoid the possible further breeding or multiplication of bacteria. (R. 64, 75, 144.)[12] The main purpose

[12] In Babcock, The Pasteurization of Milk, U. S. Department of Agriculture Leaflet No. 177 (1939) 2, the pasteurization of milk is defined as follows:

"The pasteurization of milk for direct consumption, as applied under commercial conditions, means a process of heating every particle of milk to a temperature not lower than 142° F. for not less than 30 minutes (holder process) or to a temperature not lower than 160° F. and holding at that temperature or above for not less than 15 seconds. (Short time,

of this treatment is as a precaution against the possibility that harmful germs may have accumulated in the milk, principally from contact with disease or dirty handling in the course of distribution, but also from diseases in cows which may have escaped discovery; and another purpose is to retard spoilage in the hands of the dealer, by the destruction of bacteria which may be present. (R. 71, 77–78, 79–80.)

The District Court found from the undisputed evidence that the distribution of milk has existed in the United States as a distinct form of business for nearly a century.[13] Pasteurization of milk on a substantial scale was not established in this country until 1897. It came into use in Milwaukee in 1903 and became common practice there only as recently as 1915. (Finding 9, R. 143–144; R. 81–82.)[14] In cities having over a thou-

high-temperature process.) After the milk is pasteurized, it is immediately cooled to 50° F. or lower."

[13] In Kelly and Clement, Market Milk (2d ed., 1931) 2, it is stated that shipments of milk in bulk by rail to dealers in Boston were being made in 1838 and in New York in 1847. In Roadhouse and Henderson, The Market-Milk Industry (1941) 4, it is pointed out that dealers maintained retail milk routes in large cities before 1840.

[14] In Kelly and Clement, *supra*, 327, the statement appears that it was not until 1904 that any appreciable amount of the general milk supply was pasteurized. Roadhouse and Henderson, *supra*, 5, report that prior to 1900 nearly all the milk sold in the United States was not pasteurized and by 1909 only 25 per cent of New York City's milk was pasteurized. And cf. also Sommer, Market Milk and Related Products (2d ed., 1946) 106.

sand population in the United States a majority of the milk dairies still distribute unpasteurized milk and more than twenty-five per cent of all milk sold in cities of this size is not pasteurized.[15] (Finding 9, R. 143–144; R. 75–76, 119–122, 129–130, 133.) In nearly one-third of the municipalities none of the milk dealers pasteurize the milk they distribute. (R. 132.) On the other hand, as the District Court also found, two expert witnesses in the field of dairy operation and economics, who were present at trial, testified that they had never heard of a dairy plant which pasteurized and bottled its milk which was not a distributor. (Finding 9, R. 144; R. 82, 87.)

The trial court stated that while pasteurization is an important part of the business of the twenty-seven dairies, they likewise utilize systems of rapid regular distribution of fresh milk to their customers, and maintain fleets of trucks, horse-drawn wagons, and drivers, garages, loading and unloading facilities, weighing and testing devices, storage and refrigeration rooms, and machinery for putting milk into bottles at high speed. (Finding 15, R. 146; R. 8–10.)

The court found from the evidence that the cost of pasteurization accounts for only an insignificant part of the costs of operation of the

[15] The weighted mean for all cities of at least a thousand population shows that there are 0.8 milk distributors per thousand population who do not pasteurize against only 0.17 who do. (R. 120–121.)

dairies. Of the quart of milk which, at the time of trial the Milwaukee milk dealers sold and delivered for sixteen cents, the milk itself cost 9.6 cents, the distribution in bottles about four cents[16] and the entire plant operations about one cent.[17] Only one-tenth of a cent of the cost of plant operations was attributable to pasteurization.[18] (Finding 15, R. 146; R. 11, 87–89, 93.)

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[16] Included in the four cents was also the cost of delivering whatever other products the milkman delivered.

[17] Published studies of plant costs in other areas show comparable results. Kelly and Clement, *supra*, 416, report that a study of the Borden Milk Company in New York showed 10 percent of the consumer's milk dollar went for the operation of the city milk plant. Roadhouse and Henderson, *supra*, summarize a study of twelve milk plants in a large California city, made in 1938, which show total plant processing and handling costs of .99 cent to 1.64 cents per quart of milk selling at 12 cents. The Massachusetts Milk Control Board, Summary Report on Cost of Distributing Milk in the Boston Market (1936) 14, 21, ascertained that all operations from the time the milk arrived in the city until it was stored in bottles, including an allocable portion of the administrative expenses, totalled .85 cent per quart, while retail delivery of the bottled milk cost 4.25 cents. The Report of the New York State Commissioner of Agriculture and Markets Regarding the Audit of Milk Dealers, Legislative Document No. 100 (1938) 7, reports city processing costs for milk and dairy products of .471 cent per quart of milk handled. See also Sommer, *supra*, 606; Tinley, Public Regulation of Milk Marketing in California (1938) 125–126; Federal Trade Commission, Report on the Distribution and Sale of Milk and Milk Products, Boston, Baltimore, Cincinnati and St. Louis, House Doc. No. 501, 74th Cong. 2d Sess., 146.

[18] Only a few published studies of the cost of pasteurization alone have been found. Such a breakdown apparently has

The court also found that pasteurization utilizes only a small fraction of the total personnel of the dairies.[19] (Finding 15, R. 146; R. 95.)

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little practical value. Those studies which have been published, although in different areas and for different periods do not vary substantially from the evidence in the record. Kelly and Clement, *supra*, 337, state that the average cost of pasteurizing a gallon of milk in 1922 was .49 cent (or .12 cent per quart), including depreciation, repairs, interest, labor, coal, water and refrigeration. In Bowen, The Cost of Pasteurizing Milk and Cream, U. S. Department of Agriculture Bulletin No. 85 (1914) a detailed analysis of five city milk plants shows an average pasteurizing cost of .3 cent per gallon (.078 cent per quart) including allocations of tangible and intangible plant costs. In Dow, An Economic Study of Milk Distribution in Maine, The Maine Agricultural Experiment Station Bulletin No. 395 (1939) there were compared the plant costs of seventeen raw milk distributors with twenty-eight larger distributors of pasteurized milk and it was found that there was only a .3 cent difference in plant costs for handling the milk, and part of this difference could have been due to the use as well of other than pasteurizing equipment by the twenty-eight. See also King, The Price of Milk (1920) 189, 209, and Mortensen, Management of Dairy Plants (1938) 109.

[19] The number of employees engaged in entire plant operations at the milk dealers' plants is generally considerably smaller than those engaged in actual distribution and sales. See Exhibits D through N of the stipulation (omitting only J, Pabst Farms). (R. 15–44.)

Kelly and Clement, *supra*, 358, state that in a study of 112 plants made by them in 1929 they found that in small plants ordinarily only one man was required to operate and clean the pasteurizing equipment, while in large plants 1,800 quarts of milk were pasteurized per man-hour of labor attributable to pasteurization.

And, moreover, it found the evidence to show that pasteurizing causes only a minor part of the capital investments. The investment of the dairies in pasteurizing equipment, including increased cooling equipment is from 15 to 20 per cent of the total cost of their plant equipment, but this percentage figure would be considerably smaller if the investment in such items used in pick up and distribution as trucks and other vehicles, horses, bottles, cases, etc., were taken into consideration. (Finding 15, R. 146; R. 64, 73–74.)[20]

Still further to emphasize that the milk dealers are predominantly in a distributing business is the evidence that seven of the ten whose business is described in detail in the stipulation of the parties[21] engage in the practice of buying, selling

[20] The taxpayer argues (Br. 47, and see 7, 8, 41) that pasteurization "is the central activity around which turn the other activities of the pursuit." But we are unable to find support in the record for this statement.

[21] Luick Dairy Co. sells orange drink which it prepares by mixing water with a concentrate it buys from a manufacturer. (R. 17.) Layton Park Dairy engages in the same practice. (R. 26.) Leo Galles purchases ice cream mix from manufacturers and freezes, flavors and sells it. (R. 29.) Rolland J. Ruby buys orange drink concentrate, butter, eggs, cottage cheese and buttermilk for resale purposes. (R. 35.) The Borden Co. buys orange drink concentrate, butter and eggs for resale purposes. (R. 37.) The South Side Dairy purchases orange and grape drink concentrates, butter, cottage cheese and buttermilk for resale purposes. (R. 41.) The Westfield Dairy purchases orange drink and butter for resale. (R. 43.)

and making regular deliveries along their routes of other fresh perishable foods in addition to milk, such as eggs, butter, fruit juices and fruit drinks. (R. 17, 26, 29, 35, 37, 41, 43.) And this is common practice among milk dealers and distributors. (R. 89–90.)

That washing the reusable bottles and cans and then filling them by high speed automatic methods to expedite delivery and avoid spoilage does not change the character of the business needs little elaboration.[22] Commercial vendors generally package the goods they sell for suitable handling and delivery. Milk bottles are not sold but are to be returned to the dealer; they are not permanently sealed but only temporarily capped; they do not change the form of the product nor improve its quality; the cleaning is no more than would be required of any vendor twice using a container; and the automatic operation is to expedite the dealer's delivery and does not differ essentially from filling any other container by hand.

And as an additional indication that this was not the kind of business which Congress intended to exempt from taxation as being engaged in industry is the fact that milk dealers do not come within the reason for the exemption. As has already been noted, *supra*, the stated reason for not taxing energy sold to industrial consumers was that the probable passing on of the tax by the

[22] Cf. *Williams* v. *Harrison*, 110 F. 2d 989 (C. A. 7th).

electric company would unfairly discriminate against those industrial consumers who purchased electrical energy and who had to compete with manufacturers in the same business who produced their own energy. But despite years of study in the dairy field neither of the expert witnesses who testified in court had ever heard of a fluid milk dealer or distributor who did generate his own electrical energy, since, unlike the common industrial and manufacturing enterprises electrical energy is but an insignificant item in the costs of milk dealing. (R. 83, 89, 94–95.)

We submit that from the foregoing the District Court properly concluded that the milk dairies are predominantly commercial businesses, that the sales of energy to them were for commercial consumption and that the pasteurizing of the milk could not change the character of the business but was merely an ordinary incident of that kind of business. Cf. *Richmond* v. *Dairy Co.*, 156 Va. 63; *Suabedissen-Wittner Dairy* v. *Dept. of Treas.*, 105 Ind. App. 626.[23]

In support of its argument that the energy sold to the milk dairies was not for commercial consumption, the taxpayer relies heavily upon the reasoning of the Court of Appeals for the

[23] Pasteurization has been held likewise to be merely an incident of agricultural activity where practiced at farm dairies, in cases construing the social security tax laws. *Larson* v. *Ives Dairy Co.*, 154 F. 2d 701 (C. A. 5th); *United States* v. *Vargo*, 158 F. 2d 91 (C. A. 5th).

Tenth Circuit in *United States* v. *Public Service Co. of Colorado*, 143 F. 2d 79. (Br. 20–24, 34.) There the court held that because the Treasury Regulations, until 1941, included "processing" in industrial consumption[24] the pasteurizing of milk was industrial consumption. It reasoned further that as all manufacturers and processors are engaged in part in commercial activities, it can not be said that pasteurization is merely an incident to a commercial business, since it can likewise be said that the selling of the manufactured article is always but an incident of any manufacturing business; and to follow what the court thought was the Government's position would be to tax sales to all businesses. Also, apart from the Regulations, it held that the sales of electrical energy were nontaxable because the energy was not used in the commercial phase of the dairying enterprises but in their processing or industrial phase. Pursuing this line of reasoning, the taxpayer urges that the evidence in the instant case necessitates the conclusion that pasteurization is industrial processing of milk, analogous to manufacturing which converts a raw product into a finished one, such as manufacturing steel from iron ore or gasoline from crude oil. (Br. 48–49.)

We submit that the reasoning of the Court of Appeals for the Tenth Circuit in the *Colo-*

[24] It does not appear in Section 316.190 of Treasury Regulations 46. (Appendix, *infra*.)

rado case is in error and should not be followed. We believe, first, that that court construed the statutory term "commercial" in the narrow sense of buying and selling activity, which, as we have argued herein, is erroneous. It was thus able to conclude that because pasteurizing milk is not buying and selling it was an industrial phase of the business. Second, even after construing the phrase "commercial consumption" in a narrow sense, it erred further in failing to note that even in buying and selling businesses the only taxable consumption of electrical energy must be in some incident of the business which is not in itself buying or selling.

Third, the Court of Appeals for the Tenth Circuit misconstrued the concept "industrial consumption." As we have argued, the common meaning of the phrase, which is the sense in which it was used by Congress in considering the statute, is that kind of consumption which is ordinarily engaged in by industry rather than by or as a common incident to a predominantly commercial business. Pasteurization of milk, the mere heating and recooling of milk immediately prior to bottling it, although by efficient mechanical means in large dairies, is shown by the findings of the District Court in the instant case to be merely an incident of the business of those engaged in the distribution of milk, and, as far as could be ascertained by the trial court, it is not engaged in apart from such distribution.

(R. 144.) Pasteurization is, therefore, merely an incidental activity to a commercial business and not an activity in industry.

Fourth, we believe the Court of Appeals for the Tenth Circuit erred in claiming that it relied upon the Regulations when in fact it used only that portion of the Regulations which included the word "processing" as a type of industrial consumption while it disregarded that part of the Regulations which provided that where there is no separate metering the predominant character of the business shall control. For even if the use of electrical energy for pasteurization, isolated from the other aspects of the milk dealing business, could be considered as a use in industry, we submit that the facts with respect to the fluid milk business, found by the trial court in the instant case in answer to every reasonable test of predominant character we can think of, show adequately and persuasively that the milk dealers are engaged predominantly in the commercial business of daily distribution of fresh clean milk and the pasteurization of the milk merely subserves that end.

Fifth, we submit that the reliance by both the taxpayer and the Court of Appeals for the Tenth Circuit upon the word "processing" in the Treasury Regulations prior to 1941 is misplaced because it disregarded the context in which the word appeared.

Article 40 of Regulations 42, as amended by T. D. 4393 (Appendix, *infra*), contained the phrase:

> The term "electrical energy sold for domestic or commercial consumption" does not include (1) electrical energy sold for industrial consumption, e. g., for use in manufacturing, processing, mining, refining, shipbuilding, building construction, irrigation, etc. * * *

On November 28, 1941, by T. D. 5099, 1941–2 Cum. Bull. 267 (Appendix, *infra*), the term "processing" was stricken out.

That the particular activity in which electrical energy is used may be characterized under the broad description "processing" can not be decisive, since many kinds of commercial businesses engage in processing, packaging or preparing of the product in which they deal and yet it can not reasonably be considered that because of it the nature of their business or their entire consumption of electrical energy becomes industrial. For example, a restaurant "processes" raw foods and converts them into finished products fit to be eaten. Yet one could not reasonably consider as industrial the energy used in cooking the food (whether electric, gas or other), and certainly not the entire energy used by the business—since a fair picture of the consumer's operations necessarily results in the conclusion that it is a commercial business. The same might also be said of

a tailor using electric sewing machines or a distributor of fruit or eggs who might use electrically operated devices for cleaning or polishing his products. If all those who engaged in "processing" in its broadest sense were in industry, there would be included the soda fountain, the drug store, the photographer, the optician, the jeweler who sets diamonds and repairs watches, the grocer who grinds up the coffee before selling it, and even the Government department which processes forms, letters, and memoranda.

It is obvious that the Regulations were intended by the Treasury to be construed under the *ejusdem generis* rule and the processing referred to was that engaged in by industries similar to mining, refining, shipbuilding, building construction, irrigation, etc., or else there would have been no need to enumerate them. But even more convincing proof that the Treasury intended by the phrase "electrical energy sold for industrial consumption, e. g., for use in * * * processing * * *" to include only sales to businesses predominantly engaged in processing of an industrial nature and that the processing meant did not include pasteurization of milk is the fact that shortly after it promulgated this original language the Treasury issued a ruling (S. T. 637, XII–1 Cum. Bull. 409, 410 (1933), Appendix, *infra*), in which it specifically held that a dairy which obtains milk and converts it into use for retail

purposes is engaged in a business commercial in character and the electrical energy used in such operations is subject to tax. And, in the interpretation of an administrative regulation "a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt." *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, 413–414.

The argument that Congressional re-enactment of the revenue laws from 1934 through 1940 codified the term "processing" into the law and that the Treasury could not delete the term of course argues too much, even if the term were given the meaning attributed to it by the taxpayer and the Court of Appeals for the Tenth Circuit in the *Colorado* case. If Congressional acquiescence constituted approval of the form of the Regulations prior to 1941, then under the same rule similar acquiesence from 1941 through 1948, including amendment of the specific section in 1943, must have had the same effect with respect to the deletion of the word "processing" in 1941. In *Helvering* v. *Reynolds*, 313 U. S. 428, this Court stated (p. 432):

> That rule is no more than an aid in statutory construction. While it is useful at times in resolving statutory ambiguities, it does not mean that the prior construction has become so embedded in the law that only Congress can effect a change.[25]

[25] See also *American Chicle Co.* v. *United States*, 316 U. S. 450, 454–455.

On the other hand, if taxpayer's argument were valid that the use of the word "processing" in the 1932–1941 Regulations covers pasteurization of milk and that the Court is required to hold the Regulations determinative, then the collection of the taxes would still be proper for the period subsequent to 1941, since this Court has held that the Treasury may properly change Regulations prospectively even if Congress reenacted the statute while a different interpretation had been put on it by the Treasury. *Helvering* v. *Reynolds, supra; Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90; *Morrissey* v. *Commissioner*, 296 U. S. 344, 355.

What is a far more reasonable inference from the change in the Regulations is that the Treasury realized, in the light of actual problems encountered in the administration of the electrical energy tax, that "processing" was too vague and ambiguous to be of assistance in interpreting the statute, and deleted it accordingly. It was believed that the test of what was the predominant character of the business and the listed types of business which were excluded from the tax, was as definite as general regulations could reasonably be expected to go in dealing with the broad concepts laid down by the statute and the rest must be left to case analysis.

The taxpayer (Br. 43–44) and the *amicus curiae* (Br. 20–21) also argue that the decision of the

courts below is in conflict with that portion of the Regulations which provides that the predominant character of the business carried on at a given *location* shall determine the classification of consumption, since, taxpayer asserts, the commercial activities of the milk dealers are carried on outside the plant. The argument assumes that "commercial" must be interpreted in the narrow sense of buying and selling only. The argument is also facilitated by their substituting the word "activities" for "business" in the phrase "predominant character of the business carried on at such location" in Regulations 46. But even under this narrow construction of the law certainly it can not reasonably be maintained that a distributing or delivery business is not carried on at its main office where the merchandise is brought, unloaded, sorted, packaged, stored, kept under refrigeration, made ready for delivery, and loaded, where the delivery equipment is maintained, drivers pick up their goods and receive their pay and instructions, where records are maintained, money is turned in, orders are received and where all the other functions necessary to the operation of any business are carried on. Moreover, as we have submitted, pasteurization and bottling being merely an incident to the milk dealing business, it can not be considered as consumption by industry even if it were carried on at locations separate from the ultimate buying,

selling, distributing and other characteristic tivities of a commercial business.

The taxpayer's attempt to depict the pasteurizing of milk as a manufacturing process which converts raw milk into a finished product is, we submit, likewise unreal. We do not dispute the beneficial results of pasteurization. But the record also shows that pasteurization does not change the taste, flavor, form or appearance of milk; it merely cleans or purifies it, in the only practical manner in which such cleansing can be done without changing it, against the possibility that the product may have become contaminated at its source or in handling. However, milk obtained from a healthy cow is a wholesome and beneficial food fit for human consumption with or without pasteurization. (R. 78.) Like many fruits and vegetables that must be cleaned against possible remaining insect sprays, dirt and mold-producing spores and bacteria, or like eggs which must be candled and cleaned before being sold, milk is still milk after as well as before it is pasteurized. Nothing is added by pasteurization and it will not necessarily be healthier or cleaner or contain fewer harmful bacteria because of it. (R. 9, 77–78.) Pasteurization may actually not be as effective in eliminating possible harmful bacteria as may boiling by the ordinary domestic housewife. (R. 77, 86.) Where milk is obtained from healthy cows through sanitary methods and

proper precautions are taken against contamination in the course of distribution, as in the case of certified milk, pasteurization is not essential.[26] (R. 77–78.)

We submit, therefore, that to describe pasteurized milk as in the nature of a manufactured product is a distortion and that both from the evidence and from common knowledge a more accurate characterization is that of a product which may be cleaner or purer, like other foods distributed in their natural form after they have been washed or cleaned. Cf. *Fruit Growers, Inc.* v. *Brogdex Co.*, 283 U. S. 1; *Anheuser-Busch Assn.* v. *United States*, 207 U. S. 556. And this view is supported by the weight of authority in the state courts. *City of Louisville* v. *Ewing Von-Allmen D. Co.*, 268 Ky. 652; *People ex rel E. S. Dairy Co.* v. *Sohmer*, 218 N. Y. 199; *Richmond* v. *Dairy Co.*, 156 Va. 63; *Suabedissen-Wittner Dairy* v. *Dept. of Treas.*, 105 Ind. App. 626; *People* v. *Stevens Co.*, 178 App. Div. (N. Y.) 306, appeal dismissed, 221 N. Y. 622; *Dairy Assn.* v. *Bd. of Tax Admin.*, 302 Mich. 643, 649. But

[26] Until recently the designation "certified milk" (milk produced and bottled by dairies operating under strict standards of cleanliness and purity), was not permitted to be used for milk that was pasteurized. (R. 78.) See also Kelly and Clement, *supra*, 456 and Sommer, *supra*, 102.

cf. *H. P. Hood & Sons* v. *Commonwealth*, 235 Mass. 572, 576.[27]

[27] In *City of Louisville* v. *Ewing Van-Allmen, D. Co.*, *supra*, p. 655, the court stated:

> * * * is appellee engaged in the manufacturing of milk? We think not, because the process used means nothing more than the removing of all impurities from raw milk; because all raw milk may contain various kinds of impurities coming from an unclean condition of the cow's udder or from the person doing the milking or otherwise of the cow. The old-fashioned way was using the strainer; in fact, such instruments are used now by the ordinary housewife. Still, from a healthy cow, milked by a careful person and properly strained, the milk would need no further cleansing. It is not only palatable, but nourishing and healthful. However, in later years, especially in cities and closely populated communities, it has been thought wise and proper to purify milk by machinery. We call it "pasteurizing the milk," which means nothing more or less than to remove from the raw material all germs, bacteria, and other foreign substances that might be in it. However, when the process is complete, we have nothing left but milk, the same article and raw material that comes fresh from a healthy cow by the hands of a careful and clean milker, after it has been properly strained and prepared for use by a first-class, clean and tidy housewife. The milk, after the pasteurization is complete, contains the same ingredients as it had in it when it came from the cow. It is only made clean food to be used. It has lost none of its palatable taste as when it came from a healthy cow. Still, it contains all of the ingredients that it formerly had.

In *People ex rel. E. S. Dairy Co.* v. *Sohmer*, *supra*, pp. 202–204, it was stated:

> * * * the question whether said assessment was correct or not will be determined by the answer to be

CONCLUSION

We submit that the courts below properly held that the sales of electrical energy to milk dealers and distributors, who pasteurize their milk as an incident to their business were taxable as sales of

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given to the further question whether the pasteurization of milk in which relator employed a large part of its capital is a manufacturing process. If such business was one of manufacture the relator was entitled to exemption from taxation of so much of its capital as was employed in pasteurizing milk and selling the same * * *. If in pasteurizing and selling milk it was not engaged in manufacturing, then * * * the assessment was correct. * * *

* * * * *

In the light of * * * the description of the processes through which the milk is passed and of the results obtained thereby, it is perfectly apparent that the object and result of pasteurization are to free milk from germs and foreign substances of various kinds without destroying or changing the inherent and essential qualities of the milk itself. There is no purpose by the application of any foreign substance to change its superficial appearance or by any method to alter its substantial form and character as would be the case if it were made into butter or cheese. It is entered upon the process as milk, and it is taken therefrom as milk. The only change accomplished has been to relieve it from objectionable matter which is not properly an inherent part thereof, and thereby to make it more fit for those purposes to which milk is naturally devoted.

* * * * *

* * * we are still unable to discover as the result of pasteurization any such degree of change in the form, nature or intended use of milk when compared with its original condition * * *. that the process producing such change could be regarded as one of manufacture.

energy for commercial consumption, and the decision of the Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully,

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DECEMBER 1948.

APPENDIX

Internal Revenue Code:

SEC. 3411. TAX ON ELECTRICAL ENERGY FOR DOMESTIC OR COMMERCIAL CONSUMPTION.

(a) There shall be imposed upon electrical energy sold for domestic or commercial consumption and not for resale a tax equivalent to 3 per centum of the price for which so sold, to be paid by the vendor under such rules and regulations as the Commissioner, with the approval of the Secretary, shall prescribe. The sale of electrical energy to an owner or lessee of a building, who purchases such electrical energy for resale to the tenants therein, shall for the purposes of this section be considered as a sale for consumption and not for resale, but the resale to the tenant shall not be considered a sale for consumption.

(b) The provisions of sections 3441, 3444, and 3447 shall not be applicable with respect to the tax imposed by this section.

(c) No tax shall be imposed under this section upon electrical energy sold to the United States or to any State or Territory, or political subdivision thereof, or the District of Columbia. None of the provisions of this section shall apply to publicly owned electric and power plants, or to electric and power plants or systems owned and operated by cooperative or nonprofit corporations engaged in rural electrification. The right to exemption under this subsection shall be evidenced in such manner as the Commissioner, with the approval of

the Secretary, may, by regulation, prescribe.

* * * * *

(26 U. S. C. 1946 ed., Sec. 3411.)

Section 3411 (a) was amended by the Revenue Act of 1941, c. 412, 55 Stat. 687, Sec. 521 (a) (19), to change the three percent tax to three and one-third percent.

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 616. TAX ON ELECTRICAL ENERGY.

(a) There is hereby imposed a tax equivalent to 3 per centum of the amount paid on or after the fifteenth day after the date of the enactment of this Act, for electrical energy for domestic or commercial consumption furnished after such date and before July 1, 1934, to be paid by the person paying for such electrical energy and to be collected by the vendor.

(b) Each vendor receiving any payments specified in subsection (a) shall collect the amount of the tax imposed by such subsection from the person making such payments, and shall on or before the last day of each month make a return, under oath, for the preceding month, and pay the taxes so collected, to the collector of the district in which his principal place of business is located, or if he has no principal place of business in the United States, to the collector at Baltimore, Maryland. Such returns shall contain such information and be made in such manner as the Commissioner with the approval of the Secretary may by regulation prescribe. The Commissioner may extend the time for making returns and paying the taxes collected, under such rules and regulations as he shall prescribe

with the approval of the Secretary, but no such extension shall be for more than 90 days. The provisions of sections 771 to 774, inclusive, shall, in lieu of the provisions of sections 619 to 629, inclusive, be applicable in respect of the tax imposed by this section.

(c) No tax shall be imposed under this section upon any payment received for electrical energy furnished to the United States or to any State or Territory, or political subdivision thereof, or the District of Columbia. The right to exemption under this subsection shall be evidenced in such manner as the Commissioner with the approval of the Secretary may by regulation prescribe.

Act of June 16, 1933, c. 96, 48 Stat. 254:

SEC. 6. (a) Effective September 1, 1933, section 616 of the Revenue Act of 1932 is amended to read as follows:

"SEC. 616. TAX ON ELECTRICAL ENERGY FOR DOMESTIC OR COMMERCIAL CONSUMPTION

"(a) There is hereby imposed upon electrical energy sold for domestic or commercial consumption and not for resale a tax equivalent to 3 per centum of the price for which so sold, to be paid by the vendor under such rules and regulations as the Commissioner, with the approval of the Secretary, shall prescribe. The sale of electrical energy to an owner or lessee of a building, who purchases such electrical energy for resale to the tenants therein, shall for the purposes of this section be considered as a sale for consumption and not for resale, but the resale to the tenant shall not be considered a sale for consumption.

"(b) The provisions of sections 619, 622, and 625 shall not be applicable with respect to the tax imposed by this section.

"(c) No tax shall be imposed under this section upon electrical energy sold to the United States or to any State or Territory, or political subdivision thereof, or the District of Columbia. None of the provisions of this section shall apply to publicly owned electric and power plants. The right to exemption under this subsection shall be evidenced in such manner as the Commissioner, with the approval of the Secretary, may, by regulation, prescribe."

(b) Despite the provisions of this section the tax imposed under section 616 of the Revenue Act of 1932 before its amendment by this section on electrical energy furnished before September 1, 1933, shall be imposed, collected, and paid in the same manner and shall be subject to the same provisions of law (including penalties) as if this section had not been enacted.

Treasury Regulations 42, promulgated under the Revenue Act of 1932:

ART. 40. *Scope of tax.*—The tax applies to the amount paid for all electrical energy furnished for domestic or commercial consumption, either by a privately or publicly owned operating electrical power company.

"Electrical energy for domestic or commercial consumption" includes all electrical energy furnished the consumer except electrical energy furnished for industrial consumption. Electrical energy for industrial consumption includes that used generally for industrial purposes, that is, in manufacturing, processing, mining, refining, irrigation, shipbuilding, building con-

struction, etc., and by public utilities, waterworks, telephone, telegraph, and radio companies, railroads, and other common carriers.

The tax attaches to all amounts paid for electrical energy for domestic or commercial consumption irrespective of whether any of the energy paid for is actually used. In other words, the tax is due on all payments for electrical energy whether in the form of a minimum charge, a flat charge, or otherwise.

* * * * *

T. D. 4342, XI-2 Cum. Bull. 495 (1932):

Article 40 of Regulations 42 is amended to read as follows:

"The tax applies to the amount paid for all electrical energy furnished for domestic or commercial consumption by any person or agency (whether private, public or quasi public) irrespective of whether such person or agency produces the energy so furnished. (For definition of the word 'person,' see section 1111 of the Act.)

"All electrical energy furnished the consumer is taxable except (1) electrical energy furnished for industrial consumption, e. g., that used in manufacturing, processing, mining, refining, shipbuilding, building construction, etc., and (2) that furnished for other uses which likewise can not be classed as domestic or commercial, such as used by public utilities, waterworks, irrigation companies, telegraph, telephone, and radio communication companies, railroads, other common carriers, educational institutions not operated for private profit, churches, and charitable

institutions. However, electrical energy is subject to tax if consumed in the commercial phases of industrial or other businesses, such as in office buildings, sales and display rooms, retail stores, etc.

"Where electrical energy is supplied to a single consumer for two or more purposes, the specific use for which the energy is furnished, i. e., whether for domestic or commercial consumption, or for other consumption, shall determine its taxable status. Where the consumer has all the electrical energy used at a given location furnished through one meter, the predominant character of the business carried on at such location shall determine the classification of electrical consumption for the purposes of this tax."

* * * * *

T. D. 4393, XII–2 Cum. Bull. 322 (1933):

* * * * *

Section 616 of the Revenue Act of 1932 was amended by section 6 (a) of the Act of Congress approved June 16, 1933 (Public, No. 73, Seventy-third Congress). In conformity with the law as so amended, Chapter V of Regulations 42, approved October 22, 1932, is amended, effective with respect to electrical energy sold on or after September 1, 1933, to read as follows:

* * * * *

"ART. 39. *Effective period.*—The tax applies to electrical energy sold on or after September 1, 1933, and before July 1, 1935.

"ART. 40. *Scope of tax.*—The tax is imposed upon electrical energy sold for domestic or commercial consumption and not for resale, except as provided hereinafter.

"The term 'electrical energy sold for domestic or commercial consumption' does not include (1) electrical energy sold for industrial consumption, e. g., for use in manufacturing, processing, mining, refining, shipbuilding, building construction, irrigation, etc., or (2) that sold for other uses which likewise can not be classed as domestic or commercial, such as the electrical energy used by public utilities, waterworks, telegraph, telephone, and radio communication companies, railroads, other common carriers, educational institutions not operated for profit, churches, and charitable institutions. However, electrical energy is subject to tax if sold for use in the commercial phases of industrial or other businesses, such as in office buildings, sales and display rooms, retail stores, etc.

"Where electrical energy is sold to a single consumer for two or more purposes, through separate meters, the specific use for which the energy is sold through each meter, i. e., whether for domestic or commercial consumption, or for other use, shall determine its taxable status. Where the consumer has all the electrical energy used at a given location furnished through one meter, the predominant character of the business carried on at such location shall determine the classification of consumption for the purposes of this tax." [28]

* * * * *

[28] These Regulations, consistently with extensions of the law, were altered as concerns the provision thereof concerning effective date by T. D. 4570, XIV–2 Cum. Bull. 391 (1935); again by T. D. 4751, 1937–2 Cum. Bull. 517; and again by T. D. 4922, 1939–2 Cum. Bull. 363.

Treasury Regulations 46 (1940 ed.):

SEC. 316.190 [as amended by T. D. 5099, 1941-2 Cum. Bull. 267]. *Scope of tax.*—The tax imposed by section 3411 (a) of the Internal Revenue Code, as amended, applies, except as provided hereinafter, to all electrical energy sold for domestic or commercial consumption and not for resale.

The term "electrical energy sold for domestic or commercial consumption" does not include (1) electrical energy sold for industrial consumption, e. g., for use in manufacturing, mining, refining, shipbuilding, building construction, irrigation, etc., or (2) that sold for other uses which likewise can not be classed as domestic or commercial, such as the electrical energy used by electric and gas companies, waterworks, telegraph, telephone, and radio communication companies, railroads, other similar common carriers, educational institutions not operated for private profit, churches, and charitable institutions in their operations as such. However, electrical energy is subject to tax if sold for consumption in commercial phases of industrial or other businesses, such as in office buildings, sales and display rooms, retail stores, etc., or in domestic phases, such as in dormitories or living quarters maintained by educational institutions, churches, charitable institutions, or others.

Where electrical energy is sold to a consumer for two or more purposes, through separate meters, the specific use for which the energy is sold through each meter, i. e., whether for domestic or commercial consumption, or for other use, shall determine its taxable status. Where the consumer has all the electrical energy consumed at a

given location furnished through one meter, the predominant character of the business carried on at such location shall determine the classification of consumption for the purposes of this tax.

* * * * *

S. T. 518, XI–2 Cum. Bull. 498 (1932):

Advice is requested whether electrical energy furnished bottling works, milk companies, and creameries is taxable under section 616 of the Revenue Act of 1932.

Electrical energy furnished for consumption by bottling works, milk companies, or creameries engaged in the pasteurization and bottling of milk, and in the manufacture of butter, buttermilk, chocolate milk, and cottage cheese, is not furnished for domestic or commercial consumption and is not subject to the tax imposed by section 616 of the Revenue Act of 1932. However, the use of electrical energy in branch offices or agencies of such industries is a commercial use and electrical energy so used is subject to the tax.

S. T. 637, XII–1 Cum. Bull. 409 (1933):

Advice is requested concerning the tax on electrical energy imposed by section 616 of the Revenue Act of 1932 when furnished to a farmer who runs a dairy and sells milk to a commercial dairy which distributes the milk on a retail basis.

It is held that electrical energy furnished in the general operations of farming, such as lighting the homes or dwellings, barns, and other farm buildings; ensilage cutters; cream separators; oat crushers; threshing machines; water pumps; etc., and for the operation of other miscellaneous machin-

ery such as is used in general farming operations, is domestic or commercial in its scope and, therefore, is subject to the tax imposed by section 616 of the Revenue Act of 1932.

A dairy which obtains milk and converts it into use for retail purposes is held to be engaged in a business commercial in character. Electrical energy used in such operations will be subject to tax.

Electrical energy furnished to dairies which are engaged in the manufacture and sale of butter, cheese, and similar dairy products is not subject to the tax imposed by section 616 of the Revenue Act of 1932.

1948 C. C. H., Vol. 4, par. 2633G:

.175 *Rulings reconciled.*—S. T. 637 (.045 and .065) does not amount to a reversal of S. T. 518 (.033), but is a modification and extension of the opinion rendered therein, insofar as it affects dairy farms and milk dealers. General operations of farming are domestic and commercial in character and electrical energy furnished for use in these operations is subject to the tax. The mere fact that certain incidental dairy processes are carried on at a farm will not affect the taxability of the electrical energy consumed at such a location since the predominant character of the operations of farming is held to be domestic and commercial.

Electrical energy furnished a commercial dairy or milk company which merely produces or purchases raw milk in bulk and pasteurizes it for sale either in bulk or bottled quantities, whose activities consist principally in the handling, distribution and sale of milk, is also subject to the tax.

It is only electrical energy that is furnished for direct consumption by dairies which in addition to pasteurizing and bottling milk are also engaged in all the essential manufacturing processes necessary for the production of dairy products, such as the manufacturing of butter, cheese and other dairy products, for sale on the open market as an article of commerce, that is not subject to the tax.

Bureau Letter, dated May 13, 1933 (symbols MT:ST:BHF), (333CCH¶6266.)

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